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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-1950

SHIRLEY BERK, individually and as Executrix of the Estate of Oscar Berk,

Petitioner,

vs.

COUNTY OF LOS ANGELES, as Trustee for the People of California, and CITY OF TORRANCE, as Trustee for the People of California,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court
of the State of California

BRIEF OF RESPONDENT COUNTY OF LOS ANGELES IN OPPOSITION

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OPINIONS BELOW

The opinion of the California Supreme Court is reported as County of Los Angeles v. Berk (consolidated with City of Torrance v. Berk) (1980) 26 Cal. 3d 201 [161 Cal. Rptr. 742, 605 P. 2d 381], as modified at 26 Cal. 3d 743a.

STATEMENT OF THE CASE

This case deals with an area of beachfront property in Los Angeles County, lying partially in the City of Torrance and partially in the City of Redondo Beach. As open coastal land in the nation's second largest metropolitan area, this property has been and is used annually by beach-goers numbering in the millions, according to the evidence at trial. It has been freely accessible to the public, just as any public beach, for over 50 years. The public has used the property for access, fishing, swimming, surfing, picnicking, viewing, sunbathing, and numerous sports. See Appendix 1, Findings of Fact X through XVIII.

This property was owned over the years by various landowners, individual and corporate, who aimed to develop it. However, public opposition and financing difficulties were such that these efforts were unsuccessful.

In February of 1970 the California Supreme Court announced its decision in Gion v. City of Santa Cruz (1970) 2 Cal. 3d 29 [84 Cal. Rptr. 162, 465 P. 2d 50]. 1/ This decision held that when the public has used beach land as if public for at least

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1/ The Gion case was consolidated in the Supreme Court with Dietz v. King and will be hereafter referred to as "Gion-Dietz."

five years without asking or receiving permission and without significant objection or interference from the owner, then a dedication by the owner will be implied in law.

The Gion-Dietz decision was much publicized in the legal and popular press, and thus should have been well-known to any attorney dealing with real property law in California after February, 1970.

In June 1970, Oscar Berk, the late husband of the petitioner herein, 2/ became aware of the subject property and began to consider purchasing it for a residential development. He personally inspected the property during the period of heavy summer use. County of Los Angeles v. Berk, supra, 26 Cal. 3d at 208, 161 Cal. Rptr. at 747.

Mr. Berk was advised of the problems and community opposition faced by previous owners. He opened escrow on the property, and on September 28, 1970, his escrow closed and the Berks took title. Id.

In March 1971, having obtained a building permit, Berk broke ground for construction. The County of Los Angeles (County) and City of Torrance (City), respondents herein, thereupon

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2/ Hereinafter petitioner (defendant(s)-appellant(s) below) will be sometimes referred to as "Berk" or "Berks."

filed actions to quiet title to their interest in the property as trustees of the public's right to a recreational easement pursuant to the California Supreme Court's decision in Gion-Dietz.

At the trial, the evidence presented showed the heavy use by the public already mentioned. In addition, it was proven that the County provided an extensive range of government maintenance services on the property, including life guard protection, raking, cleaning, filling of slopes, planting and irrigating. Appendix 1, Findings of Fact X through XVIII.

None of the foregoing evidence of public use or government maintenance was controverted at trial. No evidence of interference with public use, or granting of permission for public use, was presented.

The trial court found for the City and County, concluding that there had occurred "an implied dedication of property rights for beach shoreline recreational uses" to those entities, within their respective jurisdictions. Appendix 1, Conclusion of Law III.

The court found that a period of public recreational use in excess of five years existed between September 7, 1965, and September 28, 1970, the date the Berk escrow closed. Appendix 1, Finding of Fact XVI.

The findings indicate that the public recreational use existed far longer than the five year period. See Appendix 1, Findings of Fact X through XVIII.

The court found that the eleven-month period of receivership did not prevent the dedication of a public recreational easement. Appendix 1, Finding of Fact XVIII.

On appeal to the California Supreme Court, the findings and conclusions of the trial court were affirmed in full, specifically, those findings concerning the effect of the receivership and constitutionality of the Gion-Dietz principle. County of Los Angeles v. Berk, 26 Cal. 3d 201, 212-16, 220, 161 Cal. Rptr. 742, 749-51, 754-55 (1980).

I
INTRODUCTION AND SUMMARY OF KEY ARGUMENTS

Assuming arguendo that Gion-Dietz did change the law of implied dedication in California, the change took place seven months before petitioner opened escrow. See County of Los Angeles v. Berk, 26 Cal. 3d 201, 208-09, 161 Cal. Rptr. 742, 747 (1980). Therefore, since a a landowner takes subject to the existing law of real property, there has been no change in the owners' rights in the land, and thus, there has been no "taking" of a vested right in land and there is no question of lack of compensation or due process.

In any event, it did not change the law.

There is no conflict with federal bankruptcy law. Implied dedication is a question of the state law of real property.

II
PETITIONER ACQUIRED THE PROPERTY AFTER THE IMPLIED DEDICATION HAD OCCURRED AND AFTER GION-DIETZ WAS PUBLISHED

Assuming arguendo that Gion-Dietz represents a radical change in California real property law, no vested right of petitioner was affected by that change because the case was decided and announced months before the Berks purchased the property; and also the implied dedication was found to have occurred before they acquired the property on September 28, 1970. Appendix 1, Finding of Fact XVI.

The trial court found that public use had been so intense as to place any interested person on notice and concluded that the Berks were not bona fide purchasers, without notice. Appendix 1, Finding of Fact XIII, Conclusion of Law VI.

This finding and conclusion are not challenged.

The Berks, therefore, took the property with constructive notice of the implied dedication of the public recreational easement. Simmons Creek Coal Co. v. Doran, 142 U.S. 417, 437-40 (1892); Deering's California Civil Code, Section 19.

They also took the property subject to the applicable California law of real property, which

included the Gion-Dietz doctrine, as part of the "law of the land." Kallach v. Superior Court, 56 Cal. 229, 237-38 (1880); Restatement Second, Conflicts, §227 (transfer of interest in land by prescription determined by law of situs). Since the property vested in the Berks "subject to" the public recreational easement, there is simply no question of a taking without compensation or due process under the Fifth Amendment and Fourteenth Amendment.

This argument also demonstrates that the petitioner lacks standing because her property remains unchanged after the state ruling in favor of public recreational use.

Petitioner is here trying to have the Gion-Dietz doctrine overturned on grounds that it divests her of property rights, when any impact of the doctrine on the property occurred before she became the owner. This Court is being asked to render an advisory opinion. See Flast v. Cohen, 392 U.S. 83, 96-99 (1969). If no constitutional issue is raised the Court is being asked to rule on a pure question of state law.

The question of whether Gion-Dietz should be applied retroactively had already been decided in California, before the decision in the case at bar.

The Court stated in City of Long Beach v. Daughterty: "Appellants argue that it is unfair to apply Gion 'retroactively.' Appellants appear to argue that it is unfair to apply Gion to facts that existed prior to the Gion decision. But, in Gion itself, the facts existed prior to any decision finding an implied dedication in the particular

situation that existed before that court. Therefore, the argument is without merit." City of Long Beach v. Daugherty, 75 Cal.App.3d 972, 980, 142 Cal. Rptr. 593 (1977) (U.S. cert. den. in 439 U.S. 823).

III
PETITIONER NOW HAS NO INTEREST IN THE SUBJECT PROPERTY AND, THUS, THE CASE IS MOOT

This case is now moot because the Petitioner's ownership interest has been foreclosed upon by lenders. County of Los Angeles v. Berk, 26 Cal.3d 201, 206 note 3, 161 Cal.Rptr. 742, 746 note 3 (1980).

According to a recent decision of this Court, to have standing a plaintiff's claimed injury must be likely to be redressed if the requested relief is granted. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976). In the present case, should this Court overturn the decision below, declaring the recreational easement nonexistent, petitioner would gain no redress thereby, for she has no interest in the property. Since petitioner has no cognizable interest in the outcome, the case is moot, and this Court therefore lacks jurisdiction to review it. Securities & Exchange Commission v. Medical Committee for Human Rights, 404 U.S. 403, 407 (1972); Powell v. McCormack, 395 U.S. 486, 496-497 (1969).

IV

THE GION-DIETZ DECISION DID NOT CHANGE THE LAW OF IMPLIED DEDICATION IN CALIFORNIA

A reading of the two opinions makes it clear that the Gion-Dietz decision was not a statement of new law but a restatement and clarification. See Gion v. City of Santa Cruz, 2 Cal. 3d 29, 38-43, 84 Cal. Rptr. 162, 167-71 (1970); County of Los Angeles v. Berk, 26 Cal. 3d 201, 212-15, 161 Cal. Rptr. 742, 749-51 (1980).

The Berk court discussed precedent at length but really only needed to cite two old cases to show that the Gion-Dietz rule was a statement of old law.

In Union Transp. Co. v. Sacramento County, 42 Cal. 2d 235, 267 P. 2d 10 (1954), the California Supreme Court held that one form of dedication arises by conclusive presumption from substantial public use for five years without permission.

In Morse v. Miller, 128 Cal. App. 2d 237, 275 P. 2d 545 (1954) the court cited the Union Transportation analysis of implied dedication from long public use in upholding a finding of public dedication of a beach. Morse v. Miller, supra, 128 Cal. App. 2d at 244-48.

The case of F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 P. 62 (1915), on which petitioner relies heavily, was distinguished and

questioned, on this point, in both Union Transportation and Morse, in 1954, a full sixteen years before the alleged "blockbuster" decision in Gion-Dietz.

V
THE DECISION OF THE CALIFORNIA SUPREME COURT DOES NOT CONFLICT WITH FEDERAL BANKRUPTCY LAW

Contrary to petitioner's assertion, the decision of the California Supreme Court in affirming the existence of a public recreational easement over her property does not in any way interfere or conflict with the proper exercise of federal bankruptcy law under the jurisdiction of the bankruptcy court or the receiver appointed thereby.

(In any case, the tolling of the eleven-month period would not prevent implied dedication as to petitioner. A period of time far greater than five years and eleven months was found to fall within the Gion-Dietz rule as to all the parcels. Appendix 1, Findings of Fact X, XI, XII, XIII, XIV and XV.)

The interests of uniformity and consistency in application of state property law govern. The petitioner here (and her predecessors in interest) were subject to California real property law as regards title, inheritance, transfer, disposition, land use, and other relevant state

law concerning her property, there is no compelling reason under the Bankruptcy Law or other pertinent federal interest that should preempt state law concerning dedication. Because she does not like the result in the court below, petitioner would seek "a windfall by reason of the happenstance of bankruptcy," prohibited by this Court. Butner v. United States, 440 U.S. 48, 54-55 (1979).

In Butner this Court emphasized that property interests are created and defined by state law and that, unless same federal interest requires a different result, there is no reason to apply different law simply because an interested party is involved in a bankruptcy proceeding. Id. at 55. In this case petitioner was never "involved in" the bankruptcy on which she relies.

The purpose of the receivership was to prevent loss to the estate pending disposition and termination of the receivership. 11 U.S.C.A. §11(a)(3).

Since the receivership under Chapter XI ended in November of 1969, and since the eleven-month period of public use, under Gion-Dietz, did not cause any loss to the estate during the receivership, prior to disposition of the assets, it is hard to see how the use of the eleven-month period as part of the five-year period conflicts with the policy of the Bankruptcy Law.

No case has been found which holds that time during which property was under a bankruptcy receivership may not, after the receivership ends, be included in computing an adverse possession period or a period for a prescriptive easement.

However, cases have held that the Bankruptcy Court has no jurisdiction over property being adversely possessed, against the bankrupt by others. Chicago Title and Trust Co. v. National Storage Co., 103 N.E. 227, 260 Ill. 485 (1913).

Presumably, this rule would apply to the public in an implied dedication case.

Since bankruptcy jurisdiction is not interferred with by adverse user of the property, petitioner's argument for the tolling of the five-year period is unsound.

The Bankruptcy Act makes no provision for the tolling of such periods under state law. Unless the Bankruptcy Law expressly covers a particular point, state law governs. Johnson v. Crawford, 154 Fed. 761, 765 (Mid. Dist. Pa. 1907).

CONCLUSION

The Gion-Dietz doctrine is not a change of California law.

Even if it were, petitioner acquired the property after the case was decided and after it had already been retroactively applied, therefore this is not a case where change of law could divest a vested property right.

The Berk decision is not in conflict with the Bankruptcy Law.

Respondent prays that the writ be denied and that the decision of the California Supreme Court be affirmed.

Respectfully submitted,

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APPENDIX 1

Pertinent Findings of Fact and Conclusions of Law in County of Los Angeles v. Oscar Berk, No. 999,043, Superior Court of Los Angeles County, signed and made by Judge Richard S. Shauer, Judge of the Los Angeles Superior Court, on February 23, 1973, and filed by the Clerk on that day.

FINDINGS OF FACT X THROUGH XVIII

X

That for sometime well prior to 1940, back as far as the early 1920's and 1930's and continuing to the date of issuance of injunction herein, members of the general public made occasional beach and shoreline recreational uses of a various and diverse nature of the entirety of Parcel 1B and that these uses included ingress, egress, viewing, strolling, walking of dogs, photography, painting, fishing, swimming, surfing, picnicing, sunbathing, beach games and various other uses associated with beach and shoreline recreational areas and since the late 1940's and to the date of issuance of injunction herein various and diverse members of the general public have made intensive beach and shoreline recreational uses of a various and diverse nature of the entirety of Parcel 1B, and that these intensive uses included ingress, egress, viewing, strolling, walking of dogs, photography, painting, fishing, swimming, surfing, picnicing, sunbathing, beach games, bicycle riding and various other uses associated with beach and shoreline recreational areas and that said uses

by said members of the general public and the evidences of said uses were and are open and apparent.

XI

That as to Parcels 8 and 9, and that parcel of land described in Finding of Fact V, various and diverse members of the general public made various and diverse beach and shoreline recreational uses of the entirety of said parcels and that those uses included ingress, egress, viewing, strolling, walking of dogs, photography, beach games, painting, fishing, swimming, surfing, picnicing, sunbathing, bicycle riding, and various other uses commonly associated with beach and shoreline recreational areas for a period of more than five (5) years commencing subsequent to September 25, 1958 and prior to November 1, 1958, to the date of issuance of injunction herein, and that these beach and recreational uses of said parcels have been intensive and have continued to date of issuance of injunction herein without interruption and that since the late 1940's said uses have been intensive of the westerly portions of that parcel of real property described in Finding of Fact V herein, and set forth as Parcel S in Finding of Fact VIII herein, and that as to all periods of public use on said parcels of real property, said uses by said members of the general public and the evidences of said uses were and are open and apparent.

XII

That the uses of Parcels 8, 9 and 1B, and that parcel of land described in Finding of Fact V and VIII herein, by said members of the general

public, were and are made as if said parcels were part of a public recreational area.

XIII

Except as to Parcel 1B for the time period of 1947 through September 7, 1965, the uses described in Finding of Fact X and XI by said members of the general public were and are made without seeking or receiving permission to do so from anyone whomsoever or at all and that said uses were made with the owners full knowledge, and, were and are sufficiently intensive and visible as to place an owner or interested party on notice as to such uses so that slight inquiry would disclose the history, reputation, and existence of such uses and that no effective effort was made by any owner or anyone else to interfere with or halt such uses by said members of the general public at any time.

XIV

That as to Pacel 1B for the time period of 1947 through September 7, 1965, the uses described in Findings of Fact X and XI by said members of the general public were made without seeking or receiving express permission to do so from anyone whomsoever or at all and that said uses were made with the owners full knowledge, and, were sufficiently intensive and visible as to place an owner or interested party on notice as to such uses so that slight inquiry would disclose the history, reputation, and existence of such uses and that no effective effort was made by any owner or anyone else to interefere with or halt such use by said members of the general public at any time.

XV

That the COUNTY OF LOS ANGELES, through its agents and employees, has continuously for a period of more than ten (10) years preceeding the commencement of this action provided service to Parcels 8, 9 and 1B and that parcel of land described in Finding of Fact V by providing life guarding, cleaning and sanitation activities and associated services, trash pickup and occasional erosion control.

XVI

That a period of public recreational use in excess of five (5) years existed between the encumbrancing of Parcels 1B, 8 and 9 by Deed of Trust from Sovereign Development Company to beneficiary United California Bank on September 7, 1965, to the encumbrancing of Parcels 1B, 8 and 9 by virtue of a Deed of Trust from OSCAR BERK and SHIRLEY BERK to beneficiary United California Bank on September 28, 1970.

XVII

That the beach to the west of said parcels was widened by the Corps Engineers of the United States Army from late 1967 through early 1968 and that during the period of beach widening various and diverse members of the general public continued without interruption to make public recreational uses of said parcels of real property for beach and shoreline recreational purposes.

XVIII

That Parcels 1B, 8 and 9 were placed into receivership in December of 1968 by the then owner of said parcels pursuant to a proceeding

under Chapter XI of the Federal Bankruptcy Act during which time the encumbrancers were restrained from foreclosing and it so remained for a period of approximately eleven (11) months thereafter, during which time public recreational uses of the parcels continued without interruption.

CONCLUSION OF LAW III

That there was an implied dedication of property rights for beach and shoreline recreational uses to the plaintiff COUNTY OF LOS ANGELES for itself and on behalf of the public and as Trustee in Trust for the People of the State of California, of Parcels 8 and 9, during the period commencing on a date after September 25, 1958, but prior to November 1, 1958, and ending on or by November 1, 1963.

CONCLUSION OF LAW VI

That the defendants OSCAR BERK and SHIRLEY BIRK are not bona fide purchasers, without notice.